Supreme Court, U.S.
FILED

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

THE STATE OF TEXAS,
*Petitioner*

V.

WILFREDY RENE VICIOSO,
*Respondent*

On Petition for a Writ of Certiorari to the
Court of Appeals, Tenth District of Texas

# PETITION FOR WRIT OF CERTIORARI

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## Questions Presented

1. Was Vicioso's confession the tainted "fruit" of his earlier arrest, or did the evidence sufficiently show his decision to speak was so freely and voluntarily made, despite the time and manner of his arrest, that any taint associated with the arrest was removed?

2. Was the decision in *Brown v. Illinois* truly a "limited one"?

3. What degree of deference should the appellate court give to the trial judge's determination that a confession was an essentially free and unconstrained choice by its maker?

4. What is the correct standard for review of the harmfulness of the admission into evidence of an extra-judicial confession by a criminal defendant in a state appellate court?

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## PETITION FOR WRIT OF CERTIORARI

The State of Texas petitions for review of the decisions made by the Texas Court of Appeals in this case because it erroneously held that Respondent's written confession could not be used as evidence against him or that he was harmed by its use. The "attenuation doctrine", an exception to the exclusionary rule, remains unsettled or too often misunderstood.

### Opinion Below

The opinion of the court of appeals is unofficially reported at 54 S.W.3d 104. App. at A-1.

### Basis for Jurisdiction

The judgment sought to be reviewed was entered on July 18, 2001. The State's Motion for Rehearing was denied on August 22, 2001. The State's Petition for Discretionary Review by the Texas Court of Criminal Appeals was denied on January 9, 2002, with two judges noting their dissent. App. at B-1. Jurisdiction for review by this court is conferred by 28 U.S.C. §1257(a).

### Provisions of Law Involved

The right of the people to be secure in their persons . . . against unreasonable . . . seizures, shall not be violated . . .
U.S. CONST. amend. IV

No person . . . shall be compelled in any criminal case to be a witness against himself . . .
U.S. CONST. amend. V

No state shall . . . deprive any person of . . . liberty . . . without

due process of law . . .
U.S. CONST. amend. XIV, pt. 1

A statement of an accused may be used in evidence against him if it appears that the same was freely and voluntarily made without compulsion or persuasion, under the rules hereafter prescribed.
TEX. CODE CRIM. PROC. art. 38.21

No evidence obtained by an officer . . . in violation of any provisions of the Constitution or laws of the State of Texas, or of the Constitution or laws of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case.
TEX. CODE CRIM. PROC. art. 38.23(a)

**Statement of the Case**

On April 22, 1999, the residence of Dawn Mills near Carlton, Texas was burglarized. Among the items taken were a stereo and CD player, a television, a Primestar receiver, a videocassette recorder, musical CD's, and jewelry.

On May 12, 1999 at about 2:30 p.m., Hamilton County Deputy Sheriff Casey Heath took Respondent and his girlfriend, Tammy Gomez into custody. The deputies investigating a string of burglaries which had taken place during the preceding weeks desired to question Ms. Gomez because they had determined records from an area pawn shop indicated Gomez had pawned some of the property reportedly taken in one of the burglaries. It is not entirely clear why Respondent was taken into custody,

although he was with Gomez at the time her vehicle was stopped, and the deputies knew he had been residing with her and that he had previously engaged in burglaries.

Vicioso was initially told to remain in an interrogation room at the sheriff's department (which adjoins the Hamilton County Jail). Within a short time, Heath thoroughly searched Respondent, apparently to make certain he was not armed with a weapon. Vicioso was given a *Miranda* warning. Around 3:30 p.m., Vicioso was transferred to a jail cell. Deputy Jim Buster requested this be done because Gomez had orally accused Vicioso of being involved in the burglaries along with her and had directed the officers to a handgun concealed in the vehicle she and Vicioso had been using.

After obtaining information about the burglaries from Gomez, Buster visited Vicioso at his cell. Buster informed Respondent of what had happened and offered to speak with Vicioso if he wanted to. Apparently Vicioso declined and Buster left. Shortly thereafter Vicioso called for Buster to return and indicated he wanted to speak with Gomez. This was permitted and then Vicioso agreed to converse with Buster. At 6:25 p.m., Vicioso signed a written statement implicating himself in several burglaries, including the one involved in this case. On May 19, Vicioso offered to take the officers to the pawn shop in Fort Worth, Texas where he had pawned, for $400, the property he had stolen from the Mills residence. The property was discovered at the pawn shop and the proprietor identified Vicioso as the person who had brought the property there at 1:50 p.m. on April 22, 1999.

Respondent was convicted by a jury of burglary of a habitation.

Prior to trial he had moved the court to suppress his written statement, in which to a very limited extent he described his guilt of the offense.[1] The trial court, after a hearing, ruled the statement was freely and voluntarily made without compulsion or persuasion, was not impelled by reason of the arrest, and therefore was admissible under arts. 38.21 and 38.23 of the Texas Code of Criminal Procedure. App. at C-1. The prosecution accordingly utilized a redacted portion of the statement as a part of its proof.

Respondent appealed and challenged the admission of this evidence in his brief. The Texas Court of Appeals, with Justice Gray dissenting, determined the statement was the product of an illegal investigatory arrest and therefore could not be used by the State. App. at A-10. The court further found it was unable to conclude that the statement had not played a part in the jury's determination of guilt. App. at A- 14 . The case was remanded for a new trial.

**Reasons for Review**

*Brown v. Illinois* has proved unworkable. The courts have been unable to accurately distinguish when evidence is sufficiently attenuated from a violation of the Fourth Amendment to be admissible. The factual setting of this case would well serve this court in elucidating, for the first time since 1982, the "attenuation of the taint doctrine" that is so important to custodial interrogation and solving certain types of

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[1] The incriminatory part, in full, was: "Tammy Gomez and I live together. We have committed burglary together in Carlton, Texas. I have pawned property in Fort Worth."

crimes. For the first time, this court could describe the standard which should be used by state courts to review rulings on the connection between illegal custody and voluntariness of confessions.

**Attenuation remains an amorphous concept.**

Many courts have failed to recognize the explicit warning in the *Brown* opinion that the decision was intended as "a limited one", bound to a particularly inexcusable, purposeful violation of the Fourth Amendment by the Chicago police "calculated to cause surprise, fright, and confusion" and "unduly exploited" in order to obtain the confession. *Brown v. Illinois*, 422 U.S. 590, 605 (1975). Likewise, *Wong Sun v. United States*, 371 U.S. 471, 485-6 (1963) dealt with "evidence [derived] *so immediately* from . . . an unauthorized arrest", where "six or seven officers had broken the door and followed on Toy's heels into the bedroom where his wife and child were sleeping" and "he had been almost immediately handcuffed", that Toy's statement "had" to be characterized as a "'fruit' of official illegality".

Courts have also failed to recognize that the factors listed in *Brown,* to be considered to determine whether the subsequent statement is truly voluntary or a result of the illegality, are not exhaustive. They refuse to take into consideration the degree to which police conduct is material to the making of inculpatory statements by a defendant, thereby failing to limit the exclusionary rule to those violations that are related to its purpose–deterrence of unlawful police activity and judicial

integrity. Thus, time and again, *Brown* and its progeny [2] have been used to exclude voluntary confessions where deterrence was not an issue. This must be corrected.

**Unforeseeable events assured a voluntary waiver of the right to remain silent occurred here.**

Vicioso twice received *Miranda* warnings before *volunteering* at 5:35 p.m. on May 12, 1999 to speak about his involvement in the burglaries. Obviously, he had plenty of time to contemplate his right to remain silent after it was first explained to him at 3 p.m.

Significant incriminating evidence was discovered apart from the detention of Vicioso. The intervening circumstance or "break in the chain of events" which best explains why Vicioso chose to implicate himself was the decision of Tammy Gomez to tell the police what she knew of the burglaries. As a result, the fact that he had been detained for two or three hours or subjected to other mistreatment had lost any importance by the time he determined to speak with the officers.

Rather, he knew he was then going to be rightfully detained , whether he shared his knowledge about the burglaries with the police or not. The police had also found the gun in his van. These factors provided not only a valid basis for detaining Vicioso, but an independent reason for him to speak up. *E.g., Dunn v. State*, 951 S.W.2d 458, 482 (Tex.Crim.App. 1997) (confession by codefendant implicating defendant recognized as

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[2] *Dunaway v. New York*, 442 U.S. 200 (1979) and *Taylor v. Alabama*, 457 U.S. 687 (1982).

intervening circumstance); *State v. Barry*, 86 N.J. 80, 88, 429 A.2d 581, 585, *cert. denied*, 454 U.S. 1017 (1981)(White, Brennan and Marshall, JJ. dissenting); *Brown v. State*, 124 Md.App. 183, 199, 720 A.2d 1270, 1278 (1998), *cert. denied*, 353 Md. 269, 725 A.2d 1067 (1999) (when arrest ripens into a valid arrest before questioning, motion to suppress is properly denied).

Though lacking the congenial atmosphere present in *Rawlings v. Kentucky*, 448 U.S. 98, 106-110 (1980), it is equally clear that Deputy Buster was not attempting to use the Hamilton County Jail or acts of intimidation to coerce a confession out of Vicioso. Buster stated that after Gomez had confessed and pointed out the houses she and Vicioso had burglarized, he "went back to the cell Mr. Vicioso was in, and I told him we had found the gun, and that Tammy had told us about the burglaries, and at that point I asked him if he wanted to talk. I told him didn't make me no difference whether he talked or didn't, give [sic] a statement or not." Buster then left and returned only after Vicioso summoned him because Vicioso " wanted to talk". As he requested, Vicioso was then permitted a private conversation with Gomez (in which he presumably verified what Buster had told him) and then "said he was willing to give a statement." *See Anderson v. Calderon*, 232 F.3d 1053, 1075 (9th Cir. 2000), *cert. denied*, ___U.S. ___, 122 S.Ct. 580, 151 L.Ed.2d 451 (2001) (volunteered statement is best evidence that act "is sufficiently a matter of free will to be purged of the primary taint").

If Buster were intent on exploiting the effect of the earlier arrest, why would he permit Vicioso to speak with Gomez before any interrogation commenced? Furthermore, the body-

cavity search occurred not in connection with any interrogation or even investigation, but rather to "make sure there was no foreign material on his person" and because the officer "had reason to believe that there was a firearm [and was] unsure where it was". The search too, likely had little impact on Vicioso's decision more than an hour and a half later to confess his crimes.

In attempting to convince the trial judge to rule in his favor, Vicioso focused on the fact that he did not receive his warnings from a magistrate and that he was worried about getting a lot of time for possessing a firearm. *Cf. Lopez v. State*, 171 Tex.Crim. 552, 557-8, 352 S.W.2d 106, 109 (1961) (citing numerous cases from this court holding the failure to take a suspect before a magistrate is generally immaterial). He never explained what volitional role his arrest played in his decision. He did state that he had become upset and "just wanted to go ahead and get it over with", and that "they had put me back in the cell and I was fine with that–I would have dealt with that."

**Why must this evidence have been excluded?**

Even though the exclusionary rule bears some relationship to the federal constitutional prohibitions against warrantless or unreasonable seizures of a person, it is a rule of evidence or remedy promulgated by the courts or legislatures. *United States v. Peltier*, 422 U.S. 531, 538 (1975). The rule is actually a judicially created remedy rather than a personal constitutional right of the person aggrieved. Whether it should be applied in any particular situation is a separate question from whether the defendant's fourth amendment rights were violated. *United*

*States v. Leon,* 468 U.S. 897 (1984). "The Fourth Amendment contains no provision expressly precluding use of evidence obtained in violation of its commands, and an examination of its origin and purpose makes clear that the use of fruits of a past unlawful search or seizure 'works no new Fourth Amendment wrong'". *United States v. Leon*, 468 U.S. at 906. Further, the mere fact that evidence was obtained in violation of the constitution does not compel its suppression. *United States v. Janis*, 428 U.S. 433 (1976); *Illinois v. Krull*, 480 U.S. 340 (1987).

As this court has pointed out: "the question of causal connection in this setting, . . . is not to be determined solely through the sort of analysis which would be applicable in the physical sciences. The issue cannot be decided on the basis of causation in the logical sense alone, but necessarily includes other elements as well * * * considerations relating to the exclusionary rule and the constitutional principles which it is designed to protect must play a factor in the attenuation analysis * * * The penalties visited upon the Government, and in turn upon the public, because its officers have violated the law must bear some relation to the purposes which the law is to serve." *United States v. Ceccolini*, 435 U.S. 268, 274, 279 (1978).

The exclusion of derivative evidence is an outgrowth of the concept that not only should forbidden evidence not be used *in court*, but that it should not be used *at all*–that any "knowledge gained by the Government's own wrong cannot be used by it." *Wong Sun v. United States*, 371 U.S. at 485. This idea made good sense where it originated, that is, in the circumstances of *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 391 (1920) (government not permitted, before returning them, to

copy–papers unlawfully seized and claim its evidence was admissible). But, it was wisely tempered in *Nardone v. United States*, 308 U.S. 338, 341 (1939) with the recognition that a mere causal connection to a tainting event does not always justify exclusion.

Rather, it has been essential that the knowledge gained be significantly related to the wrong. The lesser the wrong or the less connected the discovery of the evidence be to the wrong, the less reason for its exclusion or identification as a fruit from a bad tree. *See e.g., United States v. Crews*, 445 U.S. 463 (1980); *New York v. Harris*, 495 U.S. 14 (1990) (confession obtained during lawful custody is not tainted by earlier, essentially unrelated, unlawful seizure). The purpose of the exclusionary rule is not served by employing it in a case such as this one. "Evidence that comes to light after official misconduct but not because of it may be introduced. No deterrent purpose is served by excluding it." *Jarvis v. United States*, 435 U.S. 934, 937 (1978)(White and Brennan, JJ. dissenting on denial of petition for writ of certiorari).

In its attempt to follow *Brown*, the lower court forgot that the exclusionary rule was designed to deter *exploitive* violations of the rights to privacy and liberty. *Cf. United States v. Green*, 111 F.3d 515, 521 (7th Cir. 1997) ("it is critical that courts wrestling with the 'fruit of the poisonous tree' issues keep that fundamental notion in mind, for when it is lost sight of the results can be most unfortunate"). If the officers lack intent to exploit the violation, the rule cannot serve to deter and there are better remedies for the abuse of the suspect. "It falls outside the offending officer's zone of primary interest." *United States v. Janis*, 428 U.S. 433, 458 (1976). That is why the flagrancy and

purpose of the officers actions is "one of the most important" of the factors identified in *Brown.*

Did this court intend in *Brown* to deny all it said in *Culombe v. Connecticut,* 367 U.S. 568 (1961) regarding police interrogation of suspects? The wisdom reflected in *Culombe* has have never been gainsaid. Thus, this court should once again seek to more closely adhere to: "that which has been the only clearly established test in Anglo-American courts for two hundred years; the test of voluntariness. Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process. The line of distinction is that at which governing self-direction is lost and compulsion, of whatever nature or however infused, propels or helps to propel the confession." *Culombe*, 367 U.S. at 602; *but see Lanier v. South Carolina,* 474 U.S. 25 (1985).

**What degree of deference should be given to the trial judge's conclusion that a confession was an essentially free and unconstrained choice by its maker?**

This court has not clearly specified what methodology should be used by the appellate court in reviewing the issue of voluntariness. The courts should "place primary reliance on the 'learning, good sense, fairness and courage' of [the] judges who . . . make the determination in the first instance." *Brown v. Illinois*, 422 U.S. at 612 (Powell and Rehnquist, JJ. concurring) The trial judge is assuredly in a better position to ascertain the relationship between the police conduct and the volition of the

suspect. That is why courts have said they will review denial of a defendant's motion to suppress a tainted confession only for "clear error" and affirm the initial decision "unless it is not supported by substantial evidence on the record; it reflects an erroneous view of the applicable law; or upon review of the entire record [the appellate court is] left with the definite and firm conviction that a mistake has been made" by the trial judge in concluding the confession was sufficiently attenuated. *United States v. Johnson*, 121 F.3d. 1141, 1144 (8th Cir. 1997). Without pretty conclusive evidence that the will of the suspect to remain silent has been overborne by police intimidation, the initial decision about the validity of his choice to speak should be upheld. That is the standard which should be adopted and ordered employed by this court.

**The overwhelming weight of the evidence of guilt dissipated the effect of permitting the jury to learn of the confession.**

Where the exclusionary rule has been violated, the proper focus is upon whether the overwhelming evidence dissipates the error's effect upon the jury's function in determining the facts so that it may be said the admission of the evidence did not contribute to the verdict. *Harris v. State,* 790 S.W.2d 568, 587 (Tex.Crim.App.1989) (attempting to synthesize the correct standard from a review of this court's decisions on the subject of harmless error); *but see Hernandez v. State*, 60 S.W.3d 106, 115 (Tex.Crim.App. 2001) (Keller, P.J. and Keasler and Hervey, JJ. dissenting)(*Kotteakos* standard of substantial and injurious effect or influence should be applied).

The current opinion wrongly implies that the only other

evidence of guilt were the accusations made by Vicioso's accomplice. App. at A-14. The principal evidence against Vicioso (which should always be sufficient to convict him) was the testimony of Robert Sillers. Sillers testified that, some ninety miles away, Vicioso was in possession of the property taken in the burglary *within two hours of* the burglarious entry into Ms. Mills's home. The overwhelming weight of the evidence, including the fact that Gomez had no apparent motive to falsely inculpate Vicioso[3], makes clear that Vicioso suffered no real harm during the trial as a result of the police tactics or the use of his statement. *See Chapman v. California*, 386 U.S. 18, 22 (1967); *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993).

Since the admission of this evidence was trial error, a qualitative assessment of its impact "in the context of the other evidence presented" was called for. *Arizona v. Fulminante*, 499 U.S. 279, 307-8 (1991). The Texas Court of Appeals wholly failed to make such an assessment. Rather, it ignored evidence favoring the trial judge's decision and gave credence to the testimony of the defendant. Unfortunately, the State must now look to this court to correct this obvious miscarriage.

**Conclusion**

We urge the court to clarify the limits of the decision in *Brown*, particularly in light of *Ceccolini* and *Leon*, much as

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[3] At no time did Gomez receive any benefit or even promise of a benefit for explaining Vicioso's involvement. Gomez had already received a sentence of 23 years' imprisonment at the time she testified– hardly an incentive to drag in another. Gomez did assert that Vicioso had the greater culpability.

Justice Powell suggested in his concurring opinion in *Brown*. Sometimes evidence obtained as a result of a premature arrest must be excluded. But, neither *Brown* nor *Wong Sun* should be permitted to be used to make the knowledge of a suspect sacred and inaccessible if the arrest only coincidentally produces the opportunity for the suspect to confess his guilt, as here.

The court should take this opportunity to reform the attenuation doctrine so that it will subserve the declared purpose of the exclusionary rule.

Respectfully submitted,

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IN THE
TENTH COURT OF APPEALS

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No. 10-99-236-CR

WILFREDY RENE VICIOSO,

Appellant

v.

THE STATE OF TEXAS,

Appellee

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From the 220th District Court
Hamilton County, Texas
Trial Court #99-06-07039

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OPINION

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A jury convicted Wilfredy Rene Vicioso of burglary of a habitation and sentenced him to life in prison after finding that the allegations of two previous felony convictions were true as alleged in the enhancement paragraph of the indictment. In four points of error, Vicioso claims that:

1. The trial court erred in overruling Vicioso's motion to suppress his written confession as a fruit of an illegal arrest, resulting in the violation of Vicioso's rights under both federal and state constitutions.

2. The trial court erred in overruling Vicioso's motion to suppress his written confession as a fruit of an illegal arrest, adversely affecting his substantial rights.

3. During the punishment phase, the trial court erred in

overruling Vicioso's motion for mistrial and/or in failing to instruct the jury to disregard evidence of an unadjudicated extraneous crime.

4. The trial court erred in overruling Vicioso's objection to the court's charge on guilt/innocence for its failure to instruct the jury to disregard his confession as the fruit of an illegal arrest.

**FACTS**

Vicioso filed a motion to suppress a written confession he gave an officer of the Hamilton County Sheriff's Department ("Department"), claiming it was the "fruit" of an arrest made without probable cause. At the suppression hearing, the State called one witness: Jim Buster of the Department. Buster testified that the Department was investigating several house burglaries in the county, including the "Diaz burglary," and that there were several suspects, including Vicioso and his girlfriend, Tammy Gomez. Both had prior convictions for burglary. Buster said that during the course of the investigation, the Department learned Gomez had pawned a stolen drill, and that investigators had interrogated Gomez and Vicioso about the drill. Apparently, neither was arrested. Later, the Department learned of a pawn ticket from Black's Pawn Shop in Granbury which might have been related to items stolen in the "Diaz burglary." The ticket, issued on the same day that the burglary occurred, was in Gomez's name. So, Buster testified, investigators began to again look for Gomez and Vicioso for questioning. We find it significant that had Buster felt at that point that probable cause existed to arrest Vicioso based on the information the Department had, he would undoubtedly have obtained an arrest warrant. That he did not demonstrates his belief that probable cause to arrest Vicioso was lacking.

Around 2:00 or 2:15 p.m., while Buster was getting a Diet Coke in Hico, he and Officer Howard Westmoreland saw Gomez and Vicioso go by in a van driven by Gomez, and they began to follow. Buster radioed ahead so that Officer Casey

Heath could stop the vehicle. Buster said that at the scene of the stop, he took Gomez out of the vehicle and asked for permission to search it, which she gave. The search revealed nothing. The fact that Buster asked for permission to search the van shows he did not believe he had probable cause to arrest Gomez.[1] The officers questioned Gomez but obtained no incriminating information. Nevertheless, the officers handcuffed Vicioso and Gomez, placed them in separate squad cars, and took them to the Sheriff's Department where they were held separately. Vicioso was strip-searched and body-cavity searched by Heath and placed in a cell.

Buster said he "focus[ed] on Mrs. Gomez" by "giving her her rights" and interrogating her. Gomez confessed to Buster that she and Vicioso had been involved in at least three burglaries in Hamilton County. She also disclosed the location of a gun hidden in her vehicle, which was retrieved. About two hours after arriving at the Sheriff's Department, she signed a written confession. Buster testified that Gomez and some officers then visited the locations of the burglaries she described.

Buster said that after he took a written statement from Gomez, he went to the cell in which Vicioso was being held and told him that Gomez had confessed to the burglaries and that the gun had been recovered. He told Vicioso it was "up to him if he wanted to give a statement or not. We had the gun, and her statement implicating him in the burglary . . . . I told him if he didn't make a statement it didn't make me any difference because we could file felon with a gun on him and [we] had the

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[1]After an arrest, officers can search the passenger compartment of the vehicle as a "search incident to arrest." *State v. Ballard*, 987 S.W.2d 889, 892 (Tex.Crim.App. 1999)

burglary." [2] After a brief absence, Buster was called back by Vicioso who asked to speak to Gomez, which was allowed briefly, and then Buster "read him his rights." Buster said, "We didn't talk about the burglary until after he was Mirandized." Vicioso then gave a written statement confessing to burglaries; this was about three hours after arriving at the Department. At the hearing, Buster identified the written statement he took from Vicioso. [3]

On cross-examination, Buster said that no traffic citations were issued, although he said the vehicle had crossed the center line of the highway several times while the officers followed it. In response to a question about whether Vicioso and Gomez were at any time "free to go" after the initial stop, Buster testified:

A. We were–asked them to accompany us down there to–for questioning.

Q. So did you just say follow me down there?

A. No. No. We put them in the car and we transported them.

. . .

Q. Are you aware whether or not the Defendant was strip-searched upon arriving at the Sheriff's Department?

A. I believe he was, yes, sir.

Q. Then he was taken and put in a jail cell, was he not?

A. At some–at some point, yes, sir, he was.

Q. Okay. He was put in a jail cell while you were working

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[2] As a convicted felon, Vicioso could not legally be in possession of a gun.

[3] The statement was later admitted at trial with some redacting of information about unindicted offenses.

with Tammy Gomez?

A. No, sir, not–not until after she had made a statement that he was involved in a burglary.

. . .

Q. Okay, so– so the basis for having – at that point he was arrested?

A. Yes. Based on her statement I felt I had probable cause to hold him in connection with the burglary. [4]

. . .

Q. All right. Did you have a warrant for his arrest?

A. Not at that time, no sir. I based it on probable cause of her statement. I obtained a warrant as soon as I could the next morning on the 13th.

Buster verified that the vehicle belonged to Gomez, that he did not talk to Vicioso at the location of the initial detention, but concentrated on talking to Gomez, and that Vicioso was not taken before a magistrate before he gave the written statement.

On re-direct examination, the State asked Buster "what did you really know" about Vicioso when he and Gomez were stopped. Buster said he knew that there was the pawn ticket in Gomez's name, that Gomez and Vicioso lived together and she drove him wherever he went, and that Vicioso had a "criminal history out of Florida."

Vicioso called Westmoreland to testify. Westmoreland thought that the vehicle had been stopped by Officer Heath for a defective taillight. He said that he did not talk to Vicioso at the scene of the stop, so he did not know what Vicioso was told

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[4] This again affirms that he did not believe that he had probable cause at an earlier time.

by other officers. He said that all the officers drove by the Courthouse in Hamilton on the way to the Sheriff's Department, without stopping. The courthouse is where the Justice of the Peace and the County Judge (who usually act as the magistrates in Hamilton County) are located. He testified that although he did not remember reading Vicioso his *Miranda* right, files from the Sheriff's Office indicated he read Vicioso his rights about thirty minutes after arrival at the Department. (Vicioso denied this.) On cross-examination, he said that Vicioso and Gomez were being "detained" for questioning.

Vicoso also called Officer Heath, who testified that he stopped the vehicle because of a "defective brake signal." He said he took charge of Vicioso, handcuffed him, and placed him in his patrol car. He said that Buster and Westmoreland told him to transport Vicioso to the Sheriff's Department "for a pending investigation." When asked if he would have removed the handcuffs if Vicioso had expressed a desire to get out of the patrol care, Heath said, "At that time, no, sir. . . .I had orders from a superior officer to take him into the – put him into my patrol car." He said that Vicioso's hands were behind him and that he was seated in the front seat of the patrol car. They arrived at the Department about 2:30 in the afternoon. The strip-search occurred about ten minutes after the arrived at the Sheriff's Department. Vicioso was moved to a cell around 3:30.

Mike Metcalf, a jailer for the Hamilton County Sheriff's Department, testified that he arrived at the jail at 4:00 p.m. on the day Vicioso was arrested. He said that Vicioso had been there for about an hour, he was in a locked jail cell, his belt had been removed, and he had already be strip-searched.

The Vicioso took the stand. He testified that Heath was flashing his lights even before turning around to follow the vehicle. He said the officers took Gomez out of the vehicle first, them removed him, handcuffed him, and placed him in Heath's vehicle. When Vicioso asked Heath whether he was

under arrest, Heath said "I don't know." Vicioso said he was not asked whether he wanted to go to the Sheriff's Departement and was given no choice about it. He said the drove past the Courthouse without stopping to see a magistrate, and that he was strip-searched five or ten minutes after arriving at the Sheriff's Department. He said Buster was "in and out" of the cell, and on one visit, told him that they had found the gun and that "I needed to go ahead and confess. If not, he was going to charge me with the gun." He also said that Buster told him that if he confessed, Buster would "talk to the D.A., you know, that I complied and worked with him, the most I would get would be ten to fifteen." Vicioso denied ever being "Mirandized."

On cross-examination, Vicoso acknowledged that he had signed the written statement, but said that he would not have done so had he known he could remain silent and could have a lawyer appointed.

After a recess but before the motion was argued, the prosecutor told the court that Buster had informed counsel that his earlier testimony was incorrect as the timing of the trip made by him and Gomez to the scene of the crimes she described. Counsel said that Buster told him that the trip occurred before Gomez gave her written statement, rather than afterwards.

The evidence at trial did not differ in any material respects from the testimony at the suppression hearing. [5]

**THE LEGAL STANDARD**

We review a trial court's ruling on a motion to suppress under the standard set forth in *Guzman v. State*, 955 S.W.2d 85, 87 (Tex.Crim.App. 1997). In *Guzman*, the Court of Criminal Appeals articulated the standard of review to be used when

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[5] We are not limited in our analysis to the evidence at the suppression hearing, but may also consider the trial evidence. *Barley v. State*, 906 S.W.2d 27, 31 n.2 (Tex.Crim.App. 1995).

deciding mixed questions of law and fact such as "reasonable suspicion" and "probable cause" as follows:

> [A]s a general rule, the appellate courts . . . should afford almost total deference to a trial court's determination of the historical facts that the record supports especially when the trial court's fact findings are based on an evaluation of credibility and demeanor [citation omitted]. The appellate courts . . . should afford the same amount of deference to trial court rulings on "application of law to fact questions," also known as "mixed questions of law and fact," if the resolution of those ultimate questions turns on an evaluation of credibility and demeanor. The appellate courts may review de novo "mixed questions of law and fact" not falling within this category.

*Id.* At 88-89. When the facts are undisputed and we are presented with a pure question of law, *de novo* review is proper. *Oles v. State*, 965 S.W.2d 641, 643 (Tex.App.–Houston [1st Dist.] 1998), *aff'd*, 993 S.W.2d 103 (Tex.Crim.App. 1999). Thus, when the issue to be determined on appeal is whether an officer had probable casue to seize a suspect, "the trial judge is not in an appreciably better position than the reviewing court to make that determination." *Guzman*, 955 S.W.2d at 87. Therefore, although due weight should be given to the inferences drawn by trial judges and law enforcement officers, determinations of reasonable suspicion and probable cause should be reviewed *de novo* on appeal. *Id.* (citing *Ornelas v. United States*, 517 U.S. 690, 699, 116 S.Ct. 1657, 1663, 134 L.Ed.2d 911 (1996)).

## LEGALITY OF THE ARREST

Vicioso argues that his arrest was in violation of, among others, the Fourth Amendment to the United States Constitution and Chapter Fourteen of the Texas Code of Criminal Procedure. U.S. CONST. amend. IV; TEX. CODE CRIM. PROC. ANN. arts. 14.01-14.06 (Vernon 1977 and Supp. 2001). He says that he

was "arrested" when officers handcuffed him during the road stop and then transported him to the Sheriff's Department. We agree. An "arrest" occurs "when a person's liberty of movement is successfully restricted or restrained, whether this is achieved by an officer's physical force or the suspects submission to the officer's authority." *Medford v. State*, 13 S.W.3d 769, 773 (Tex.Crim.App. 2000). [6] Furthermore, an arrest is complete only if "a reasonable person in the suspect's position would have understood the situation to constitute a restraint on freedom of movement of the degree which the law associates with formal arrest." *Id.* (citing *United States v. Corral-Franco*, 848 F.2d 536, 540 (5th Cir. 1988)). The subjective intent of either the police officer or the defendant is irrelevant. *Medford*, 13 S.W.3d at 773-74.

Although the stop of Gomez's van may have been justified as a traffic stop, or perhaps even as an "investigatory stop" of both Vicioso and Gomez, [7] once the officers handcuffed Vicioso, placed him in a squad car, and drove him to the Department (much less strip-searched him and placed him in a cell), it cannot be disputed that he was under arrest. The question is: Was the arrest legal?

***Statutory Basis***

It is undisputed that no warrant for Vicioso's arrest was obtained until the next day. Chapter Fourteen of the Code of Criminal Procedure details when an officer may make a

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[6] Article 15.22 of the Code of Criminal Procedure, "A person is arrested when he has been actually placed under restraint or taken in custody by an officer or person executing a warrant of arrest, or by an officer or person arresting without a warrant," is not a controlling legal definition of "arrest." *Medford*, 13 S.W.3d at 772.

[7] Persons "reasonably suspected" of criminal activity can be briefly detained for questioning without probable cause or a warrant. *Terry v. Ohio*, 392 U.S. 1, 22, 88 S.Ct. 1868, 1880, 20 L.Ed.2d 889 (1968).

warrantless arrest. TEX. CODE CRIM. PROC. ANN. arts. 14.01-14.06. Under these facts, none of the articles in Chapter Fourteen apply, nor does the State so argue. [8] Therefore, the arrest, and the subsequent detention, were illegal. A "voluntary" confession given after an illegal arrest in tainted, and, as "a direct result of" the arrest, must be excluded under article 38.23(a) of the Code of Criminal Procedure. *Bell v. State*, 724 S.W.2d 780, 787 (Tex.Crim.App. 1986) (citing *Wong Sun v. United States*, 371 U.S. 471, 485, 83 S.Ct. 407, 416, 9 L.Ed.2d 441 (1963)). Article 38.23(a) reads in part:

> No evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, or of the Constitution or laws of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case.

TEX. CODE CRIM. PROC. ANN. art. 38.23(a) (Vernon Supp.2001). Therefore, Vicioso's statement should have been excluded at trial.

**Constitutional Basis**

Aside from Chapter Fourteen and article 38.23, the Fourth Amendment requires probable cause before an arrest without a warrant can be made. U.S. CONST. amend. IV; *State v. Ballard*, 987 S.W.2d 889, 892 (Tex.Crim.App.1999). "Probable cause for an arrest exists where, at that moment, facts and circumstances within the knowledge of the arresting officer, and of which he has reasonably trustworthy information, would warrant a reasonably prudent person in believing that a particular person has committed or is committing a crime." *Id.* There is no basis in these facts on which to find probable cause.

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[8] Gomez, who was driving, could have been arrested for a traffic violation, but she was not arrested or even ticketed for that. Therefore, under Chapter Fourteen, it appears there was no statutory authority to arrest Gomez.

Buster's testimony affirmatively shows that he knew he did not have probable cause at the time Vicioso was arrested. Therefore, the arrest was illegal, and the confession should have been excluded under the "exclusionary rule" as "a direct result of" the arrest. *Bell*, 724 S.W.2d at 787 (citing *Wong Sun*, 371 U.S. at 485, 83 S.Ct. at 416).

**Attenuation of the Taint**

Because the statement is made inadmissible by the express wording of article 38.23, and also by the exclusionary rule, it might appear our analysis is finished. However, the Court of Criminal Appeals has held that when the complained of evidence is a confession given after an illegal arrest, the analysis must continue. *Dowthitt v. State*, 931 S.W.2d 244, 261 (Tex.Crim.App.1996); *Bell*, 724 S.W.2d at 788-89. We must also determine if the confession was given so freely and voluntarily that the causal connection between the arrest and the confession is broken, and therefore any taint from the illegal arrest is removed, thereby making the statement admissible. *Bell*, 724 S.W.2d at 788-89. To make this determination, we analyze the facts against four factors.

1. Were Miranda warnings given?

2. How much time elapsed between the arrest and the confession?

3. What intervening circumstances occurred between the arrest and the confession?

4. What was the purpose and flagrancy of the official misconduct?

*Bell*, 724 S.W.2d at 788 (citing *Brown v. Illinois*, 422 U.S. 590, 604-05, 95 S.Ct. 2254, 2261-62, 45 L.Ed.2d 416 (1975)).

Buster testified he "Mirandized" Vicioso just before taking his

confession. Vicioso denied he was ever "Mirandized." However, if this occurred it was only after Vicioso had been strip-searched and body-cavity searched, placed in a cell, told that Gomez had confessed and implicated him in burglaries, and threatened with indictment for a weapons charge. We do not find that this factor weighs in the State's favor.

About three hours elapsed between the arrest at the road-stop and when Vicioso gave the written statement. Considering the stress under which he was placed (strip-searched and body-cavity searched, placed in a cell, threatened by Buster), "an inference of a lack of time for reflection appears warranted." *Bell*, 724 S.W.2d at 789.

The intervening circumstances between the arrest and the statement clearly weigh in Vicioso's favor. To repeat, after he was arrested, he was taken to jail, strip-searched and body-cavity searched, placed in a cell, and threatened by Buster. These circumstances do not support an inference that Vicioso's statement was freely given.

Finally, the fourth factor, the purpose and flagrancy of the official misconduct, is one of the most important of the factors. *Id.*; *Renfro v. State*, 958 S.W.2d 880, 886-87 (Tex.App–Texarkana 1997, pet. ref'd). In this case, there was no probable cause and no warrant. There may not even have been sufficient reason for an "investigatory detention" of Vicioso. This was a clear violation of the Fourth Amendment and of Chapter Fourteen. This factor weighs heavily in Vicioso"s favor.

We conclude that the taint was not attenuated. *See Hadnot v. State*, 945 S.W.2d 278, 285-86 (Tex.App.– Beaumont 1997, no pet.) (taint not attenuated– the main purpose of the illegal arrest was investigatory).

**Conclusion**

The arrest was illegal, and there was no attenuation of the taint. The statement, as a "fruit of the poisonous tree," should

not have been admitted at trial.

**HARM ANALYSIS**

Having concluded that admission of the statement was error, we must next determine if we should grant Vicioso a new trial. We must reverse for constitutional error unless we determine beyond a reasonable doubt that the error did not contribute to the conviction or punishment. TEX. R. APP. P. 44.2(a). The admission of the written statement was a constitutional error.

The application of the standard of reversing for constitutional errors was explained in *Harris v. State*, 790 S.W.2d 568 (Tex.Crim.App.1989). Citing *Fahy v. Connecticut*, 375 U.S. 85, 88, 84 S.Ct. 229, 231, 11 L.Ed.2d 171 (1963), the *Harris* court said: "We are not concerned here with whether there was sufficient evidence on which the petitioner could have been convicted without the evidence complained of. The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction. To decide this question, it is necessary to review the facts of the case and the evidence adduced at trial." *Harris*, 790 S.W.2d at 585. The goal is to examine all the evidence "solely to trace the impact of the error. The untainted evidence is not to be weighed in its own right, nor is it to be examined to see if it is cumulative with the tainted evidence." *Id.* Based on *Harris*, we do not review the evidence against Vicioso at trial, absent his own statement, to determine if the evidence was sufficient to support a conviction. That would place us in the shoes of the jury, substituting ourselves for the jury as factfinder. Rather, our inquiry is whether we can say beyond a reasonable doubt that the statement did not prejudice the jurors' decision-making process. *Id.* at 587.

*Harris* states six factors we should consider in reaching our conclusion: (1) the source of the error, (2) the nature of the error, (3) whether and to what extent the State emphasized the error, (4) the probable implications of the error, (5) how much

weight a juror would probably place on the error, and (6) whether declaring the error harmless would encourage the State to repeat the error.

Other than his own written confession, the primary evidence against Vicioso at trial was Gomez. However, Gomez is an "accomplice witness." The Code of Criminal Procedure provides:

> A conviction cannot be had upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the offense committed; and the corroboration is not sufficient if it merely shows the commission of the offense.

TEX. CODE CRIM. PROC. ANN., art. 38.14 (Vernon 1979). The trial court gave an accomplice-witness instruction in the jury charge based on this statute.

The source and nature of the error here was a blatant violation of Vicioso's Fourth Amendment rights by law enforcement officers. Declaring the error harmless would not encourage law enforcement to follow the Constitution as well as Chapter Fourteen in the future. Furthermore, the State certainly emphasized and relied on the confession throughout the trial. In addition, there is hardly ever more damaging evidence in a criminal trial than the defendant's admission of guilt. With the remaining evidence consisting primarily of the accusations of the accomplice witness, it is likely that the jury relied, at least in part, on the confession when reaching the verdict. Based on this analysis, we cannot say beyond a reasonable doubt that the jury was not affected by Vicioso's statement. Therefore, we find the admission of the statement to be harmful error requiring reversal.

Because we find a harmful constitutional error, we do not reach the issue of whether the violation of Chapter Fourteen

should result in reversal. [9]

## OTHER POINTS

Because we will reverse on the suppression point, we do not decide Vicioso's other complaints.

## CONCLUSION

Vicioso's statutory and constitutional rights were violated when he was illegally arrested The statement he gave was therefore inadmissible at trial. The court's error in overruling the suppression motion and admitting the statement at trial was harmful. We reverse the judgment and remand the cause for proceedings consistent with this opinion.

BILL VANCE

Justice

Before Chief Justice Davis,
Justice Vance, and
Justice Gray
(Justice Gray dissenting)
Reversed and remanded
Opinion delivered and filed July 18, 2001
Publish

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[9] We will not reverse a non-constitutional error unless a substantial right of the accused has been affected. TEX.R.APP.P. 44.2(b).

## DISSENTING OPINION

A jury convicted Wilfredy Rene Vicioso of burglary of a habitation and sentenced him to life in prison after finding that the allegations of two previous felony convictions were true as presented in the enhancement paragraph of the indictment. In four points of error, Vicioso claims that:

> 1. The trial court erred in overruling Vicioso's motion to suppress his written confession as a fruit of illegal arrest, resulting in the violation of Vicioso's rights under both federal and state constitutions.
>
> 2. The trial court erred in overruling Vicioso's motion to suppress his written confession as a fruit of illegal arrest, adversely affecting his substantial rights.
>
> 3. The trial court erred in overruling Vicioso's motion for mistrial and/or in failing to instruct the jury to disregard evidence of an unadjudicated extraneous crime during the punishment phase.
>
> 4. The trial court erred in overruling Vicioso's objection to the court's charge on guilt/innocence for its failure to instruct the jury to disregard his confession as the fruit of illegal arrest.

We should affirm the decision of the trial court. Because the majority does not, I respectfully dissent.

### FACTUAL BACKGROUND

The criminal investigation division of the Hamilton County Sheriff's Office was involved in an ongoing investigation of several house burglaries. Among the suspects were Vicioso and his girlfriend Tammy Gomez, both known to have been

convicted of burglary and to have pawned stolen property. When Investigator Buster and his partner received a pawn ticket linking Gomez to a burglary at the Diaz residence, they began looking for the pair for questioning. Later that day, the van driven by Gomez was stopped by Hamilton County deputies. According to testimony, the deputies observed a traffic law violation. However, their primary reason for the stop was to afford Buster an opportunity to question Gomez. Vicioso was a passenger in the van at the time. A verbal warning was given for the traffic violation.

At the side of the road, Buster advised Gomez that they needed to talk about the pawn ticket for stolen property. Gomez gave permission for the van to be searched, but the officers found nothing related to the burglary. Gomez was arrested, advised of her rights, and transported to the Sheriff's Office. According to testimony, Vicioso was not advised of his rights, but was handcuffed and transported in a separate vehicle to the Sheriff's Office for a "pending investigation."

Upon arrival at the Sheriff's Office, Buster questioned Gomez. Gomez stated that she and Vicioso had been involved in several burglaries in Hamilton County and described the residences burglarized and some of the property taken, as well as what had been done with the property. She also told the officers where to find a gun that was hidden in the van. About two and a half hours after arriving at the Sheriff's Office, Gomez signed her written statement implicating Vicioso in several burglaries.

While the officers concentrated on Gomez and her story, Vicioso waited-first in the interrogation room and then in a holding cell. Shortly after arriving at the Sheriffss Office, Vicioso was strip searched in the interrogation room. The officer did not find any contraband during the body cavity search. Although he did not remember giving Vicioso his rights, Buster's partner testified that the Sheriff's files indicated that he had warned Vicioso in accordance with *Miranda* about

thirty minutes after Vicioso arrived. While Buster accompanied Gomez to a burglary location, Vicioso was moved to a holding cell.

After obtaining Gomez's statement, Buster spoke with Vicioso in his cell, informing him that the handgun had been located [1] and that Gomez had told him about the burglaries. Buster gave Vicioso the option of making a statement, then left Vicioso in the cell. A short time later, Buster was called back to the cell because Vicioso wanted to talk. Vicioso first spoke privately with Gomez, then announced that he was ready to give a statement. Buster warned Vicioso in accordance with *Miranda* before he gave his statement and then again after completion of the confession (about four hours after arriving at the Sheriff's Office). Vicioso was arraigned before a magistrate the next morning.

Vicioso admitted to several burglaries in his statement, including burglary of the Mills residence in Carlton, the Diaz residence west of Hamilton on Highway 36, and the Burdett residence east of Hamilton on Highway 36. Because Vicioso was indicted only for burglary of the Mills residence, the court instructed the State to present a redacted copy of the confession as evidence during the guilt-innocence phase of the trial. At the punishment phase, the State introduced another redacted copy of the statement that reflected his admission to all three burglaries. The jury never saw the entire written confession.

## MOTION TO SUPPRESS

In his first two points of error, Vicioso contends that the trial court erred in overruling his motion to suppress his written statement. Specifically, he claims that his confession should be suppressed because (1) it is the product of an illegal arrest; (2) the failure to take him before a magistrate tainted his statement;

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[1] As a convicted felon, Vicioso could not legally be in possession of a handgun.

and (3) his statement was not voluntarily given.

**Standard of Review**

The *Guzman* court established the standard that we use to review the denial of a motion to suppress. See *Guzman v. State*, 955 S.W.2d 85 (Tex.Crim.App.1997). In that opinion, the Court of Criminal Appeals stated:

> [A]s a general rule, the appellate courts ... should afford almost total deference to a trial court's determination of the historical facts that the record supports especially when the trial court's fact findings are based on an evaluation of credibility and demeanor. The appellate courts ... should afford the same amount of deference to trial courts' rulings on 'application of law to fact questions,' also known as 'mixed questions of law and fact,' if the resolution of those ultimate questions turns on an evaluation of credibility and demeanor. The appellate courts may review *de novo* 'mixed questions of law and fact' not falling within this category. [citations omitted].

*Id.* at 89. When the facts are undisputed and we are presented with a pure question of law, *de novo* review is proper. *Oles v. State*, 965 S.W.2d 641, 643 (Tex.App.–Houston [1st Dist.] 1998), *aff'd*, 993 S.W.2d 103 (Tex.1999).

(1) *Illegal arrest*

It is unclear when Vicioso was actually arrested. According to the trial court's findings of fact, Vicioso was under arrest at the time of his written confession. The officer who transported Vicioso to the Sheriff's Office and performed the strip search testified that Vicioso was merely detained until he was moved to the holding cell; at that point, Vicioso was "arrested." Buster testified that Vicioso was not arrested until Gomez had completed her statement about an hour and a half later. The record does not indicate an exact arrest time; the State's brief, however, refers to "the arrest at 2:30 p.m."-the time that Vicioso

was handcuffed at the side of the road. Vicioso's pre-trial testimony indicates that he felt that he was not free to leave at the time of the traffic stop. Because it would not affect the ultimate disposition of the issue, I will assume that the custodial detention that began at the side of the road at 2:30 p.m. amounted to an arrest.

The parties do not seem to dispute the other historical facts regarding the arrest. [2] In his brief, Vicioso is questioning the application of law to the facts. Therefore, it is proper that a de novo review based on an arrest time of 2:30 p.m. is conducted.

Vicioso argues that his statement was the fruit of an illegal warrantless arrest. According to Vicioso, his written confession was obtained in violation of the federal constitution, the state constitution, and the Texas Code of Criminal Procedure. The State claims that the arrest was legal, but adds that any possible taint associated with Vicioso's arrest was subsequently purged.

There is no dispute that Vicioso was arrested without a warrant. In Texas, a warrantless arrest is illegal unless it falls under one of the statutory exceptions to the warrant requirement. *See Self v. State*, 709 S.W.2d 662, 665 (Tex.Crim.App.1986). The only statutory exception that is potentially applicable here is article 14.04 of the Texas Code of Criminal Procedure, which provides that an officer may arrest a suspect upon the representation of a credible person that a felony has been committed and that the offender is about to

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[2] Vicoso testified at the pre-trial hearing that his rights were not read to him. According to his testimony, he was told to sign or initial documents without having them explained. However, in his brief, Vicioso refers to Buster's testimony that he gave Vicioso his rights, but makes no comment. He makes no reference to Buster's partner's testimony that he had *Mirandized* Vicioso shortly after his arrival at the Sheriff's Office. The brief only complains that the officer who transported Vicioso to the Sheriff's Office never read the *Miranda* warning nor heard anyone else do so. The State does not contest that.

escape, leaving no time to obtain a warrant. TEX. CODE CRIM. PROC. ANN. art. 14.04 (Vernon 2000). There is no evidence that Vicioso was about to escape. Without further analysis, I will assume that Vicioso's arrest was illegal.

All evidence obtained as the direct result of an illegal arrest must be excluded under the Fourth Amendment to the United States Constitution and article 38.23 of the Texas Code of Criminal Procedure. Simply because evidence is obtained subsequent to an illegal arrest, however, does not automatically render it inadmissible. *Bell v. State*, 724 S.W.2d 780, 787 (Tex.Crim.App.1986). Subsequent statements are admissible if the confession was "the product of the defendant's free will sufficient to purge the primary taint of the illegal arrest." *Roeder v. State*, 768 S.W.2d 745, 752 (Tex.App.– Houston [1st Dist.] 1988, pet. ref'd). The factors generally considered in assessing whether the taint of an unlawful arrest has been sufficiently attenuated to allow admission of the evidence are:

1. Whether *Miranda* warnings were given;

2. The temporal proximity of the arrest and the evidence;

3. The presence of intervening circumstances; and

4. The purpose and flagrancy of the official misconduct.

*Brown v. Illinois*, 422 U.S. 590, 603-04, 95 S.Ct. 2254, 2261-62, 45 L.Ed.2d 416 (1975).

With regard to the first factor, the record shows that Vicioso was given *Miranda* warnings at least once before he gave his statement. Vicioso signed the Statement of Rights and initialed the warnings printed at the top of his voluntary statement. Although *Miranda* warnings alone are not enough to purge the taint of an illegal arrest, they are considered a threshold requirement. *Townsley v. State*, 652 S.W.2d 791, 796 (Tex.Crim.App.1983). Thus, the first factor weighs in favor of admitting the statement.

The second factor generally carries little weight as a determinative factor when taken alone. Not surprisingly, courts cannot agree on what constitutes a sufficient number of hours to establish that a statement is unrelated to an illegal arrest. *See Bell v. State*, 724 S.W.2d 780, 788 n. 4 (Tex.Crim.App.1986). The *Bell* court does, however, consider whether the defendant had a chance to reflect before giving his statement. *Id.* at 789, 791. About three hours passed between Vicioso's arrival at the Sheriff's Office and his statement. Although this is a relatively short amount of time, Vicioso spent much of that time alone in the interrogation room and then in a holding cell. While no one knows what went through his mind during that time, Vicioso did have an opportunity to reflect upon his situation. This factor too tends to favor admitting the statement.

With regard to the third factor, it must be determined if there were intervening circumstances that might have broken the causal link between the arrest and the confession. *Black v. State*, 762 S.W.2d 192, 193 (Tex.App.–Houston [1st Dist.] 1988, pet. ref'd). The State claims that any unreasonableness of the detention was removed once Vicioso's accomplice implicated him in the crimes. The State refers us to the *Townsley* case, in which evidence establishing probable cause was obtained after the defendant was illegally arrested. [3] The evidence was obtained by examining the body of the deceased and by interviewing neighbors. The Court of Criminal Appeals held that the causal chain was broken because the evidence was independent of the illegal arrest and furnished probable cause for the arrest of the defendant. *See Townsley v. State*, 652 S.W.2d 791 (Tex.Crim.App.1983). Here, evidence implicating Vicioso was obtained from his accomplice. Although both

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[3] On the strength of the precedential nature of this case alone, I would argue that the majority has failed to correctly apply the law to the facts of this case. The detention in *Townsley* was well in excess of the detention in this case.

Vicioso and Gomez were brought into the Sheriff's Office at the same time, the record shows that only Gomez was initially questioned about the burglaries. Gomez provided evidence incriminating Vicioso. Thus, the evidence establishing probable cause against Vicioso was not a product of his illegal arrest. As in *Townsley*, Vicioso confessed to the crimes after probable cause had been obtained from other sources. "Under these circumstances, it would be unrealistic *not* to conclude that significant intervening events broke any causal connection between appellant's brief illegal detention... and his subsequent confessions." *Id.* at 797-98 (emphasis in original).

There is another incident that could also be considered an intervening circumstance. The record shows that Inspector Buster was called back to Vicioso's cell because Vicioso wanted to talk. Courts have commonly accepted that a volunteered statement not made in response to police interrogation is sufficient to purge the taint of an illegal arrest. *Bell v. State*, 724 S.W.2d 780, 789 n. 5 (Tex.Crim.App.1986). Both incidents tend to favor admission of the statement.

The fourth factor, the purpose and flagrancy of police conduct, is more problematic with regard to this case. We have already defined flagrantly abusive police conduct as: "reliance on factors in making an arrest which were so lacking in indicia of probable cause as to render belief in its existence entirely unreasonable; an arrest effectuated as a pretext for collateral objectives; or an arrest which is unnecessarily intrusive on personal privacy." *Holmes v. State*, 962 S.W.2d 663, 669 (Tex.App.--Waco 1998, pet. ref'd, untimely filed).

Although there is conflicting testimony from law enforcement officers, it appears that the vehicle carrying Gomez and Vicioso was stopped for the collateral purpose of questioning the driver about a burglary. The Supreme Court has held, however, that police officers may stop and briefly detain persons reasonably suspected of criminal activity even if probable cause to arrest is not then present. *Terry v. Ohio*, 392 U.S. 1, 22, 88 S.Ct. 1868,

1880, 20 L.Ed.2d 889 (1968). The officers had physical evidence, the pawn ticket, linking the driver of the vehicle to a crime. The Court of Criminal Appeals has held that passengers in an automobile are also subject to temporary investigative detentions. *Gearing v. State*, 685 S.W.2d 326, 328 (Tex.Crim.App.1985) (op. on reh'g). Law enforcement officers were aware of Vicioso's past criminal record and his association with a suspect in the Diaz burglary, Gomez. On the other hand, the strip and body cavity search was intrusive on Vicioso's personal privacy, although testimony indicated that possession of a firearm was suspected. As noted, a firearm was later found hidden in the van.

In *Brown*, a leading example of flagrant police conduct, the defendant was virtually ambushed at gunpoint by three plainsclothes officers as he returned home one evening. The *Brown* court held that the arrest had the "appearance of having been calculated to cause surprise, fright, and confusion." *Brown v. Illinois*, 422 U.S. 590, 606, 95 S.Ct. 2254, 2262. The *Irby* court adopted this standard, finding an illegal arrest was not flagrant because it did not "overawe appellant or deprive him of free will." *Irby v. State*, 711 S.W.2d 337, 339 (Tex.App.– Dallas 1986, pet. ref'd). Although Vicioso testified that he was confused at the time of the traffic stop, there is no evidence that law enforcement officers planned to frighten Vicioso into confessing or that Vicioso was deprived of his free will. Buster testified that Vicioso did not appear excessively frightened or in fear; Vicioso was upset that Gomez gave a statement, however. Vicioso was a suspect and was detained while another suspect was being questioned about the burglaries. He was allowed time to reflect on his situation and subsequently initiated the actual making of his statement. This was not a flagrant act by law enforcement to coerce a confession. Although I do not condone the manner of the arrest and subsequent search, the actions of law enforcement do not shock the conscience. Based on all the circumstances, this

factor is neutral because the purpose was well-intentioned and not unreasonable, but the strip and body cavity search in the absence of probable cause and without a warrant was a flagrant violation of Vicioso's rights.

In summary, after considering all four factors, I conclude that the State met its burden to show that the taint, if any, of the illegal arrest was overcome. Therefore, I conclude that the statement should not have been suppressed.

(2) *Magistrate*

Vicioso further contends that his statement was tainted by the failure to take him before a magistrate in a timely manner. At the pre-trial hearing, Vicioso testified that if he had been taken before the magistrate, he would not have made the statement. Because resolution of this issue turns on an evaluation of Vicioso's credibility and demeanor, we afford almost total deference to the trial court's determination of the historical facts. *See Guzman*, 955 S.W.2d at 89.

Article 14.06 of the Texas Code of Criminal Procedure provides that upon being arrested, a suspect shall be taken before a magistrate "without unnecessary delay" so that the magistrate can advise him of his *Miranda* rights. TEX. CODE CRIM. PROC. ANN. art. 14.06(a) (Vernon Supp.2000). The failure to take an arrestee before a magistrate in a timely manner will not invalidate a confession unless the arrestee can show the causal connection between the confession and the delay. *Cantu v. State*, 842 S.W.2d 667, 679 (Tex.Crim.App.1992). An unreasonable delay will not vitiate an otherwise voluntary confession if the arrestee was properly advised of his *Miranda* rights. *Id.*

Here, the record shows that Vicioso was taken before a magistrate the morning after his arrest and written statement. Buster testified at the pre-trial hearing that he advised Vicioso of his rights. As evidence, the State produced the Statement of Rights signed by Vicioso prior to giving his statement. On the

other hand, Vicioso testified that his rights were never explained to him and that he did not recall signing the Statement of Rights on the day of his arrest. At the pre-trial hearing, the judge had the opportunity to question Vicioso about his understanding of his rights. The determination of whether the confession would not have been given by Vicioso if he had been taken immediately to a magistrate and given his *Miranda* warning required the trial court to resolve disputed facts and decide issues of credibility. Accordingly, I would defer to the trial court's determination that the statement should not have been suppressed because of the delay in taking Vicioso before a magistrate.

(3) *Voluntariness*

Vicioso argues that his statement should have been suppressed because it was not given voluntarily. Specifically, he argues that the statement was involuntarily given simply because it was a product of unlawful arrest. Again, we afford almost total deference to the trial judge's determination of the historical facts. *See Guzman*, 955 S.W.2d at 89. After reviewing the record, I find that the State met its burden of showing that Vicioso's statement was freely and voluntarily given. Although Vicioso testified that there were threats that he would be charged with possession of a firearm and promises of a fifteen-year sentence if he cooperated, the trial judge is the sole judge of the weight to give the evidence and credibility of the witnesses. The trial court was free to believe Vicioso's version of how the confession was obtained, but did not.

Thus, I would hold that the trial court did not err by denying Vicioso's motion to suppress because (1) the connection between the illegal arrest and the statement was so attenuated as to dissipate the taint; (2) the delay in taking Vicioso before a magistrate did not taint his statement; and (3) the statement was freely and voluntarily made by Vicioso without compulsion or persuasion. I would overrule points of error one and two.

## PUNISHMENT PHASE

In his third point of error, Vicioso contends that the trial court erred in overruling his motion for mistrial and in failing to instruct the jury to disregard evidence of the Burdett burglary during the punishment phase of the trial. The State introduced evidence of Vicioso's involvement in this unadjudicated burglary for the jury's consideration in assessing the appropriate punishment for Vicioso as an habitual criminal. See TEX. CODE CRIM. PROC. ANN. art 37.07 § 3(a). Vicioso moved for mistrial at the conclusion of the State's evidence, claiming that the State had not proved beyond a reasonable doubt that Vicioso had committed the burglary. The trial court denied the motion for mistrial. Vicioso also objected to the charge of the court at the punishment phase, requesting that the jury be instructed not to consider evidence of the Burdett burglary at all in deliberations regarding punishment. The court overruled the objection, but it did instruct the jury to disregard the evidence unless it found that Vicioso committed the offense beyond a reasonable doubt. "Reasonable doubt" was defined in the charge of the court.

**Extraneous Offense**

Evidence as to any matter may be offered during the punishment phase if the court deems it relevant to sentencing, including but not limited to

> the prior criminal record of the defendant, his general reputation, his character, an opinion regarding his character, the circumstances of the offense for which he is being tried, and, notwithstanding Rules 404 and 405, Texas Rules of Criminal Evidence, any other evidence of extraneous crime or bad act that is shown beyond a reasonable doubt by evidence to have been committed by the defendant or for which he could be held criminally responsible, regardless of whether he has previously been charged with or finally convicted of the crime or act.

TEX. CODE CRIM. PROC. ANN. art. 37.07 § 3(a). A trial court's

actions as to the admissibility of an extraneous offense is reviewed under an abuse of discretion standard. *Saenz v. State*, 843 S.W.2d 24, 26 (Tex.Crim.App.1992). Whether the evidence establishes the extraneous bad act beyond a reasonable doubt, however, is a question of fact for the jury and not a preliminary question of admissibility for the trial court. *Mitchell v. State*, 931 S.W.2d 950, 953 (Tex.Crim.App.1996).

Here, the State introduced evidence of an unadjudicated extraneous offense for consideration by the jury in the punishment phase. The court properly instructed the jury that before considering other offenses in determining Vicioso's punishment, it must find beyond a reasonable doubt that he committed those offenses. Therefore, Vicioso's claim that the State did not prove that he committed the Burdett burglary beyond a reasonable doubt fails. The jury as the finder of fact could only consider the extraneous offense if it first determined that the State's burden of proof had been met.

**Mistrial**

A trial court's denial of a motion for mistrial is reviewed under an abuse of discretion standard. *State v. Gonzalez*, 855 S.W.2d 692, 696 (Tex.Crim.App.1993). A mistrial is a device used to halt trial proceedings in extreme cases when error is so prejudicial as to appear calculated to inflame the minds of the jury members. *Moore v. State*, 882 S.W.2d 844, 847 (Tex.Crim.App.1994). The determination of whether a mistrial is required must be based on the particular facts of each individual case. Courts have commonly accepted that harm can be cured by a jury instruction to disregard the evidence if there is error instead of declaring a mistrial. *Hernandez v. State*, 805 S.W.2d 409, 413-14 (Tex.Crim.App.1990).

Here, we discern no abuse of discretion in the trial court's denial of a mistrial. Art. 37.07 § 3(a) allows introduction of extraneous crimes or bad acts proven beyond a reasonable doubt during the punishment phase, and the trial court did instruct the

jury to disregard evidence of the Burdett burglary if the State did not prove beyond a reasonable doubt that Vicioso committed the act. The trial court could have reasonably concluded that the evidence was not so inflammatory as (1) to prevent the jury from rationally evaluating whether the State had proved Vicioso's involvement in the Burdett burglary beyond a reasonable doubt, or (2) to prevent the jury from properly disregarding the alleged extraneous offense in determining punishment if the State failed to meet its burden of proof.

For these reasons, I would overrule Vicioso's third point of error.

## JURY CHARGE: GUILT/INNOCENCE PHASE

Finally, Vicioso claims that the court erred in failing to include an instruction to the jury that any statement that is obtained from the accused while held pursuant to an illegal arrest is not admissible. This is simply a misstatement of the law by Vicioso. As discussed, subsequent statements are admissible if the confession was "the product of the defendant's free will sufficient to purge the primary taint of the illegal arrest." *Roeder v. State*, 768 S.W.2d 745, 752 (Tex.App.–Houston [1st Dist.] 1988, pet. ref'd). The inaccurate instruction requested by Vicioso was properly rejected by the trial court; therefore, I would overrule Vicioso's fourth point of error.

## CONCLUSION

Having overruled Vicioso's four issues, I would affirm the trial court's judgment. Because the majority does not, I respectfully dissent.

TOM GRAY
Justice

Dissenting opinion delivered and filed on July 18, 2001
Publish

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COURT OF CRIMINAL APPEALS OF TEXAS
P.O. BOX 12308, CAPITOL STATION,
AUSTIN, TEXAS 78711

January 9, 2002

COA#: 10-99-0236-CR

RE: Case No. 1926-01

STYLE: VICIOSO, WILFREDY RENE

On this day, the State's Petition for Discretionary Review has been REFUSED.

(PRESIDING JUDGE KELLER AND JUDGE KEASLER WOULD GRANT)

Troy C. Bennett, Jr., Clerk

C-1

NO. 99-06-07039-HCCR

| | | |
|---|---|---|
| THE STATE OF TEXAS | 0 | IN THE 220TH JUDICIAL |
| V. | 0 | DISTRICT COURT OF |
| WILFREDY RENE VICIOSO | 0 | HAMILTON COUNTY, TEXAS |

ORDER REGARDING WRITTEN STATEMENT

Comes now the Court, after a hearing on defendant's motion to suppress his written statement dated May 12, 1999, and enters its written findings of fact and conclusions of law regarding the admissability [sic] of said statements.

Findings of Fact

1) The defendant was arrested and in custody at the time of making the statement in question.

2) Prior to making the statement the defendant was given warnings in accordance with 38.22 of the Code of Criminal Procedure at 5:35 P.M.

3) Thereafter the defendant did give the statement in question to Officer Jim Buster concluding at 6:25 P.M.

4) The statement also contains written warnings in accordance with 38.22 CCP.

5) The statement was not the result of any promise, threat or inducement to the defendant.

6) The defendant knowingly, intelligently and voluntarily waived these rights set forth in 38.22 CCP prior to and during the making of the statement.

7) The defendant freely and voluntarily made the statement.

Conclusions of Law

1) The statement, as redacted in accordance with the prior written instructions dated July 21, 1999, was freely and voluntarily made by defendant without compulsion or persuasion.

2) The statement, as redacted, is admissible as provided by law.

Based on the foregoing the Court orders that the statement in question, as restated, is admissible against the accused in his trial.

Done this 22nd day of July, 1999.

/s/ James E. Morgan
JAMES E. MORGAN,
JUDGE PRESIDING